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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Nichols & Company prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in this case on March 7, 1962, and the order of the Court of Claims entered in this case on May 9, 1962, denying petitioner's motion for rehearing and other relief.

THE OPINION BELOW

The opinion in the Court of Claims is reported at Ct. Cls. , and F. 2d . It is set forth in the Appendix.

JURISDICTION

The judgment of the Court of Claims was entered on March 7, 1962 (App. *supra* pp. 20, 74). A timely motion for rehearing and other relief was denied on May 9, 1962 (App. p. 75; R-235).[1] By an order dated July 26, 1962 Justice White extended the time for petitioning for certiorari to and including September 6, 1962. The jurisdiction of this Court is invoked under 28 USC 1255.

---

[1] The reference "R" is used to refer to what corresponds to the historical common law record, certified separately by the Clerk of the Court of Claims. It includes the pleadings, the Commissioner's report, the opinion, judgment and findings of the Court of Claims, and the order denying petitioner's motion for reconsideration and other relief.

Petitioner has designated for inclusion in the transcript the complete record and all proceedings and evidence in the case in the Court of Claims. References to the transcript of testimony are herein indicated by "Tr". Other references are believed to be self-explanatory.

Petitioner has been informed by the Clerk of this Court that provisions of Rule 21 of this Court permitting optional filing of the record as printed for the use of the Court below, do not apply to the Court of Claims, because a court of first instance. Petitioner accordingly will lodge with the Clerk of this Court 9 sets of copies of certain documents believed desirable for convenient consideration of the issues by this Court. They will include the printed Commissioner's report, printed exceptions of the parties to that report, petitioner's printed motion for re-hearing, defendant's response and petitioner's reply thereto.

The pages of the Commissioner's report so lodged will be numbered corresponding to the numbering placed thereon by the Clerk of the Court of Claims in preparing the certified record. Thus, references in the petition to pages of the Commissioner's report may be readily located in the lodged copies, as well as in the certified copy.

THE QUESTIONS PRESENTED

1. Did the Court deny petitioner basic rights guaranteed by the Fifth Amendment in failing to give petitioner the benefit of well-established rules of law which

a. require that inspection made by the purchaser under contracts of sale, take place in the manner provided by the contract;

b. excuse a seller from the condition of inspection in a contract of sale, when the purchaser arbitrarily rejects the goods without inspection;

c. require that executive regulations be non-discriminatory, and that in particular, a Department of Agriculture regulation affecting the marketing of agricultural products must not be discriminatory;

d. require regulations to be published in the Federal Register in accordance with the Administrative Procedure Act, so that the public may ascertain with reasonable certainty the nature and scope of its rights and duties.

2. Did the Court deny petitioner the full and fair hearing guaranteed it by the Fifth Amendment in:

a. disregarding facts found by it;

b. disregarding facts reported by the Commissioner, and supported by undisputed evidence;

c. disregarding facts supported by undisputed evidence, concerning which there was no controversy;

d. making findings of fact adverse to petitioner, with no support in the evidence, and frequently with no request by either party as a basis therefor.

3. Did the Court err in refusing to grant petitioner a rehearing following its dismissal of three counts due to a misunderstanding of petitioner's oral argument, erroneously believed by the Court to include a concession that damages had not been proved under those three counts.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the Constitution, which provides in relevant part:

> "Amendment V. Due Process of Law
>
> No person . . . shall be deprived of life, liberty, or property, without due process of law; . . ."

The statutory provision involved is the Administrative Procedure Act (Act of June 11, 1946, 60 STAT. 238) which provides in relevant part:

> 5 U.S.C. 1001(c) . . . Rule means the whole or any part of any agency statement of general or particular applicability and future effect designed to . . . or prescribe the law or policy or to describe the organization, procedure, or practice requirements of any agency . . .
>
> 5 U.S.C. 1002 . . . Rules.—Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . . ; and (3) substantive rules adopted as authorized by law . . . No person shall in any manner be required to resort to organization or procedure not so published.

The regulations involved are those pertinent to USDA grading service, 7 C.F.R., part 55 (1949 ed) as follows:

> § 55.2 *Terms defined.* For the purpose of the regulations in this part, unless the context otherwise requires, the following terms shall be construed, respectively, as follows:
>
> (a) "Act" means the following provisions of the Department of Agriculture Appropriation Act, 1952 (Pub. Law 135, 82d Cong., approved August 31, 1951), or any future act of Congress conferring like authority:

* * * Market inspection of farm products: For the investigation and certification, in one or more jurisdictions, to shippers and other interested parties of the class, quality, and condition of any agricultural commodity or food product, whether raw, dried, canned, or otherwise processed, and any product containing an agricultural commodity or derivative thereof when offered for interstate shipment or when received at such important central markets as the Secretary may from time to time designate, or at points which may be conveniently reached therefrom under such rules and regulations as he may prescribe, including payment of such fees as will be reasonable and as nearly as may be to cover the cost for the service rendered * * *

* * * * *

(d) "Administration" means the Production and Marketing Administration of the Department.

(e) "Administrator" means the Administrator of the Production and Marketing Administration of the Department or any other officer or employee of the Department, to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in his stead.

* * * * *

(g) "Interested party" means any person financially interested in a transaction involving any grading, appeal grading, or regrading of any product.

* * * * *

(i) "Grader" means any employee of the Department authorized by the Secretary, or any other person to whom a license has been issued by the Secretary, to investigate and certify, in accordance with the act and this part, to shippers of products and other interested parties the class, quality, and condition of such products.

* * * * *

(k) "Inspector" means any employee of the Department authorized by the Secretary, or any other person to whom a license has been issued by the Secretary, to inspect and certify the condition and wholesomeness of products.

(l) "Supervisor of packaging" means any employee of the Department authorized by the Secretary, or any other person to whom a license has been issued by the Secretary, to supervise the packaging and grade-labeling of products.

(m) "Product" or "products" means eggs (whether shell, liquid, frozen, or dried), egg products, and such other perishable farm products as the Secretary may hereafter designate. Such term shall also include any food product which is prepared or manufactured from any product if such product constitutes at least 50 percent, by weight, of all the ingredients used in the preparation or manufacture of such food product.

* * * * *

(y) "Official plant" means any plant in which the facilities and methods of operation therein have been found by the Administrator to be suitable and adequate for grading service in accordance with this part.

* * * * *

§ 55.5 *Where grading service is offered.* Any product may be graded, inspected, and sampled wherever a grader, sampler, or inspector is available and the facilities and the conditions are satisfactory for the conduct of the grading service.

* * * * *

§ 55.7 *Who may obtain grading, inspection, and sampling service.* An application for grading, inspection, or sampling service may be made by any interested person, including, but not being limited to, the United States, any State, county, municipality, or common carrier, and any authorized agent of the foregoing.

§ 55.8 *How to make application.* An application for any grading service may be made in any office of grading, or with any grader, sampler, or inspector at or nearest the place where the service is desired. Such application for service may be made orally (in person or by telephone), in writing, or by telegraph. If an application for grading service is made orally, the office of grading, grader, sampler, or inspector with whom such application is made, or the Administrator, may require that the application be confirmed in writing.

* * * * *

§ 55.19 *Grading certificate issuance.* Each grader and each inspector shall issue a grading certificate covering each product graded; but in no case shall a grader or inspector sign any certificate covering any product not graded by him.

* * * * * *

§ 55.22 *When appeal grading may be requested.* An application for an appeal grading may be made by any interested party who is dissatisfied with any determination stated in any grading certificate, if the identity of the samples, or the product, has not been lost; and such application for an appeal grading shall be made within two days following the day on which the grading was performed. Upon approval by the Administrator, the time within which an application for an appeal grading may be made may be extended.

§ 55.23 *How to obtain appeal grading.* Appeal grading may be obtained by filing a request therefor (a) with the Administrator, (b) with the grader or inspector who issued the grading certificate with respect to which the appeal grading is requested, (c) with the immediate superior of such grader or inspector, or (d) with the officer in charge of any office of grading. The application for appeal grading shall state the reasons therefor and may be accompanied by a copy of the aforesaid grading certificate or any other information the applicant may have secured regarding the product, at the time of grading from which the appeal is requested. Such application may be made orally (in person or by telephone), in writing, or by telegraph. If made orally, written confirmation may be required.

* * * * *

§ 55.30 *Regrading of a graded product; application for regrading of a graded product.*—(a) *Regrading of a graded product.* Whenever the immediate superior of a grader has evidence that such grader incorrectly graded a product, such superior shall immediately make a regrading of the product.

(b) *Application for regrading of a graded product.* An application for the regrading of any previously graded product may be made at any time by any in-

terested party; and such application shall clearly indicate the reasons for requesting the regrading. The provisions of the regulations relative to grading service shall apply to regrading service.

* * * * *

LICENSED GRADERS, INSPECTORS, SAMPLERS, AND SUPERVISORS OF PACKAGING

§ 55.33 *Who may be licensed.* Any person possessing proper qualifications, as determined by an examination for competency, may be licensed by the Secretary as a grader, inspector, sampler, or supervisor of packaging. Such examination shall be held at such time and in such manner as may be prescribed by the Administrator. All licenses issued by the Secretary shall be countersigned by the officer in charge of the poultry grading and inspection service of the Administration. Any prospective licensee, other than a Federal or State employee, shall, prior to the granting of the license, procure and deliver to the Administration a surety bond, issued by such surety as may be approved by the Administrator, in the amount of $1,000 for the proper performance of the duties of such licensee under the act and this part.

§ 55.34 *Limited license may be issued.* To any person possessing proper qualifications, as determined by the Administrator, there may be issued a limited license by the Secretary to perform the following functions: (a) To candle and grade eggs on the basis of Official United States Standards of Quality of Individual Shell Eggs with respect to eggs purchased from producers or eggs to be packaged with official identifications, and (b) to inspect liquid and frozen eggs that are produced under the supervision of an inspector. No person to whom a limited license is issued by the Secretary shall have the authority to issue any grading certificate; and all eggs (whether shell, liquid, or frozen) which are graded and inspected by any such person shall thereafter be check-graded and check-inspected by a grader or an inspector. All limited licenses, issued as aforesaid shall be countersigned by the aforesaid officer in charge of the poultry grading and inspection service of the Administration.

§ 55.35 *Suspension of license.* Pending final action by the Secretary the aforesaid officer in charge of the poultry grading and inspection service may, whenever he deems such action necessary, suspend any license or limited license issued pursuant to this part, by giving notice of such suspension to the respective licensee or limited licensee, accompanied by a statement of the reasons therefor. Within seven days after the receipt of the aforesaid notice and statement of reasons by such licensee or limited licensee, he may file an appeal in writing, with the Secretary supported by any argument or evidence that he may wish to offer as to why his license or limited license should not be suspended or revoked. After the expiration of the aforesaid seven day period and consideration of such argument and evidence, the Secretary will take such action as he deems appropriate with respect to such suspension or revocation.

* * * * *

§ 55.52 *Supervisor of packaging required.* The official identification of any graded or inspected product, as provided in §§ 55.49 to 55.55, both inclusive, shall be done only under the supervision of a grader, inspector, or supervisor of packing. The authority to use grade identification labels may be granted by the Administrator only to applicants who make the services of a supervisor of packaging available for use in accordance with this part.

STATEMENT

Prefatory Apologia

This is a suit against the United States in the Court of Claims under the Tucker Act, 28 USC 1491, by petitioner, to recover damages for breaches of contracts entered into with the United States Department of Agriculture (hereinafter sometimes referred to as USDA).

Petitioner is mindful of this Court's requirement of brevity. Any superficial appearance of undue length in this petition will, petitioner submits, be dispelled in its reading.

Petitioner in preparing the case for trial as originally filed discovered wholesale and persistent fraud in the official USDA grading of eggs at Chicago, the nation's largest terminal market. Victims were down-state shippers such as petitioner, and the consuming public.

Knowledge by certain USDA officials that petitioner intended to use the statistical study demonstrating fraud in evidence in the case, produced a climax of acts designed to deter petitioner from filing and prosecuting this action.

Somewhat full discussion is further warranted by the published opinion of the Court, severely and expressly condemning petitioner for making unfounded charges against conscientious government employees. The effect of that condemnation would necessarily be to discredit petitioner in its petition to this Court, as well as to make certain that petitioner's president, unless relieved from that stigma, will be barred from the industry in which he has spent his entire working life.

These unusual features of this case, and other almost equally remarkable and unusual aspects of it, are herein presented for this Courts' consideration.

I.

PETITIONER AND ITS BUSINESS

Petitioner and its predecessor companies have been engaged in the wholesale poultry and egg business in rural Iowa and Illinois for many years. Owned by the Nichols family, the business was one of the largest of its kind in the United States. The experience and training of three generations of this family were among its intangible assets. (App. 20, Pl. Ex. 13, p. 4)

In 1951, petitioner used as bases of operation two modern well-equipped plants in rural Illinois, 10 miles apart, in the towns of Avon and Bushnell. The Bushnell plant was equipped for poultry dressing and for freezing the contents of eggs broken out of the shell, as well as handling

shell eggs. A fleet of modern, air-conditioned trucks had regular routes running into Missouri and Iowa to pick up eggs from petitioner's regular suppliers. At both plants the eggs were then graded for quality, and packed. Petitioner was a consistent quality egg buyer, offering its farmer-suppliers a market for quality eggs at premium prices. (R. 111, App. 20, Pl. Ex. 13, pp. 4-6).

II.

USDA GRADING SERVICE

For many years the Department of Agriculture has performed official grading and certification of quality of eggs and poultry. Resident graders were furnished individual plants, (a separate contract normally being made for each plant although with the same concern), under standard contracts for continuous grading service upon the payment of various fees and charges which made USDA grading service self-sustaining. (App. 21)

In 1951 and the first part of 1952, contracts in the standard form were entered into with petitioner which called for official resident grading of shell (unbroken) eggs at both Avon and Bushnell, and frozen eggs and poultry at Bushnell. (App. 51).

In addition, and as was customary, separate, standard continuous service contractual arrangements were made time after time with the USDA beginning in 1951, for grading shell eggs packed in the familiar 1-dozen capacity consumer carton; these agreements were general, not confined to a single plant. The grading involved could be performed only upon USDA additional authorization to a resident, licensed shell egg grader, to grade eggs in consumer cartons, as well as in the standard 30-dozen case. (R. 117-122)

USDA grading service was permissive, in the sense that the products could, by laws, be marketed without official grading. Customer demand made USDA grading a business necessity. (App. 21)

In 1952, petitioner in its own name, and also in the name of its broker, Sol Rich & Co., made numerous bids to sell shell eggs to the USDA, under a surplus commodity purchase program. Acceptances obligated petitioner to deliver about 57,000 cases of eggs (of 30-dozen capacity) at Peoria, Illinois, Memphis, Tennessee, Burlington, Iowa, and St. Louis, Missouri. Inspection was to be made by the USDA before acceptance. Performance began in August of 1952, and continued into November of that same year. (App. 22-32)

III.

THE PETITION AS ORIGINALLY FILED IN THE COURT OF CLAIMS

The First Four Counts

The Court of Claims petition initially contained four counts. (R. 1-31)

Count I charged prejudiced, biased, unfair and fraudulent inspections at Peoria on the part of Thomas McCurley, State Supervisor for the USDA, and his assistant, Robert Young; refusal by them to inspect and to re-inspect lots tendered for that purpose; and related misconduct, in breach of the contracts of sale; and use by the USDA of a candler in making all inspection at all points, in violation of those contracts, due to its excessive candlepower and unduly concentrated light beam.[1]

Counts II, III, and IV charged the USDA with breaches of contract from early 1952 onward, by failure to provide grading service with respect to frozen eggs, shell eggs in consumer cartons, and poultry, respectively.

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[1] The quality of an egg is determined by a process called candling. This consists of holding the egg before a light beam in a darkened room; the shadows of the contents may be seen through the translucent shell. (App. 46)

IV.

THE ORIGIN AND NATURE OF COUNT V

A. Dolson's Threat to Destroy Petitioner for Seeking Justice

Shortly after McCurley began inspecting eggs tendered for delivery at Peoria, petitioner complained under the standard disputes clause that his inspections were biased, unfair and prejudiced, and of refusal to both re-inspect and to inspect in the first instance lots tendered for that purpose. No decision was ever made by the USDA on these and subsequent complaints to the same effect. (App. 44, 46)

In the fall of 1952, shortly after complete performance of the contracts of sale, Merlin Nichols, petitioner's president, told Lawrence Dolson, Regional Supervisor for USDA, that he intended to file a claim against the Government. Dolson responded by threatening to put petitioner out of business by the exercise of his authority to supervise the administration of the production and marketing inspection and grading service. (App. 56, 57, R. 62)

Petitioner's difficulties with McCurley and Dolson in obtaining grading service increased, especially after the filing of such a claim with the General Accounting Office on January 18, 1953. (Pl. Ex. 13)

B. Petitioner's Discovery of Widespread Fraudulent USDA Egg Grading

Petitioner's written claim to the General Accounting Office stressed the "large area for the exercise of personal judgment and opinion which makes bias or prejudice by inspectors so ruinous in its consequences." (Pl. Ex. 13, p. 4).

The USDA filed a statement in opposition to the claim's allowance, to the effect that egg grading was almost precise science, leaving little room for the exercise of judgment, which, in McCurley's case, might be affected by bias, prejudice, or ill will. (Def. Ex. 2, pp. 5, 6)

To counter that contention, petitioner made a statistical study of four years' (1949-1952) of all official USDA grading at Chicago as shown by official certificates. (App. 48, 49)

The study showed more than substantial variation due to judgment differences. It showed persistent and widespread fraud in official USDA grading of eggs.[1] (App. 49)

Eggs purchased by dealers in the Chicago terminal market from rural areas and paid for on the basis of USDA grading on their arrival were, after 7 or 8 months in storage, graded upon their sale as if they had increased, remained constant, or counter to standard experience had diminished only slightly in quality. (App. 48, 49)

The market system of premiums and discounts enabled the Chicago dealers to obtain substantial but illicit profits from the fraudulent grading, without ever seeing an egg, victimizing rural shippers and/or the consuming public. (App. 48, 49)

C. The Cancellation of All Petitioner's Grading Service Contracts and Destruction of Its Business, Giving Rise to Count V

In late March of 1955, in the course of preparation for trial, the USDA learned that petitioner intended to put its statistical study in evidence. (Pl. Ex. 14) At the time petitioner was operating under the highly profitable Tri-States Marketing Plan as exclusive selling agent for 39

[1] The Court made this finding in terms of concessions wrung on cross-examination from high ranking USDA officials Termohlen and Miller, stating that they testified the variations "could not be attributed to human error," *i.e.*, they were due to human *design*.

The Court also found (App. 49) that the USDA "declined to verify or dispute . . . analyses" which showed the fraud.

wholesalers. The resident egg inspector assigned by USDA to petitioner was replaced, at Dolson's direction, on April 15, 1955. The replacement, one John Schoonover, did not pass a single lots of eggs. He worked at such a slow pace that even if he had passed the lots sold, petitioner would not have had facilities for the lots coming in daily from the 39 member-wholesalers. (App. 64-68)

In the furor caused by Schoonover, all of petitioner's grading service contracts were, on May 3, 1955, cancelled by the USDA. The Tri-State Marketing Plan was destroyed. (App. 69-74)

Petitioner for several years thereafter operated unsuccessfully and then went out of business. (R. 158; petitioner's letter of Nov. 13, 1951 Ct. Cls.)

D. The Addition of Count V to the Petition

Count V was added by amendment on October 7, 1955. It sets forth the foregoing events as a breach of implied promise not to commit acts designed to deter and to punish petitioner for asserting and enforcing its rights under its contracts with the USDA. (R. 37)

It was added only after months of negotiation, including invocation of the Senate Small Business Committee. By placing the issues before the Court, Count V precluded any further Congressional inquiry and action. (R. 232; Pl. Ex. 82)

V.

THE COMMISSIONER'S REPORT

After the conclusion of the trial sessions, the Commissioner on July 29, 1960, made his report to the Court. (R. 73-159) He found the merits of all the charges in petitioner's favor. Except by way of footnote to his findings,

he generally refrained from drawing ultimate, abstract conclusions of fact.[1]

The Commissioner found petitioner failed to prove the damages sustained under Counts II, III, and IV. He nonetheless reported the facts fully, because of their interrelationship with and bearing upon Counts I and V.

Both parties filed exceptions and briefed the issues for the Court below.

VI.

THE DECISION BELOW

The Court of Claims heard argument, and received a supplementary letter from petitioner about petitioner's then business status. Respondent's attorney represented to the Court orally that petitioner had continued in business and was in business the very day in November 1961 of the argument, which was counter to the information possessed by petitioner's attorney.

Checking back with his client following argument petitioner's attorney verified the fact that petitioner had been out of business for some time. Petitioner's attorney so stated in his letter of November 13, 1961 to the Court and opposing counsel offering to have the case reopened on that issue if necessary. (Letter certified by Clerk in Record.)

---

[1] Defendant's Brief and Exceptions to the Commissioner's Report fairly described the report in stating (p. 188):

> "In his Report the Commissioner has generally avoided making ultimate findings of fact upon which a judgment for either party can be based. Instead, he has set out in narrative form a complex set of events extending over a considerable period of time, with the intention of having the reader draw inferences as to the motives of the parties and the propriety of their behavior from the order and juxtaposition of events, the emphasis given to certain incidents, and the direction to which the narrative seems to lead. To guide the reader in that direction, the Commissioner has appended a series of voluminous footnotes which serve as a gloss or running commentary on the text . . ."

Findings by the Court, a written opinion, and dismissal of the petition in its entirety followed. (App. 1-74; R. 161-234)

A. The Involuntary "Voluntary Dismissal" of Counts II, III, and IV

Counts II, III and IV, relating to grading services denied from early 1952 onward, the Court dismissed pursuant to the following finding (App. 21):

> "3. Since, during the oral argument of this case, plaintiff conceded that it had failed to prove it sustained any damages under Counts II, III and IV, the Court makes no findings of fact with respect to those counts."

The Court's opinion ambiguously described the above finding by stating (App. 21):

> "(The) petition also contained Counts II, III, and IV, but our Commissioner has found, and plaintiff admitted, on oral argument, that it had not made out a case on these counts."

No such admission or concession was made, on oral argument or otherwise.

Petitioner had fully briefed those counts, and argued that they were meritorious. In connection with Counts III and IV, the point was made that the damages sought—expenses in expectation of USDA performance—were inadequate as a matter legal necessity. Petitioner was never able to obtain official grading of eggs in consumer cartons, and never able to operate its poultry dressing plant. Lost profits were, therefore, speculative.

Petitioner can only surmise that its argument about inability to prove *full* damages was misunderstood, as being an admission that *no* damages were proved.

Discussion of the specific facts proved under Counts II, III and IV demonstrate that the merits of the issues were

with petitioner and that petitioner should have been granted recovery. (*Infra*, pp. 21-24) There was, accordingly, no reason for petitioner to concede or admit any inadequacy in the claims those counts stated.

B. The Failure to Make Findings Under Counts II, III, and IV Although Relevant to Counts I and V

As the above findings state, no other findings were made by the Court under Counts III, IV, and V.

The Commissioner had made full findings on the merits of those counts for the expressly reported reason that,

> ". . . It seems fair to report the facts rather fully, since the . . . position taken by McCurley is indicative of prejudice toward Nichols."[1]
>
> * * * * *
>
> "McCurley avoided giving Nichols the same service which was given to other dealers. Although Nichols did not prove the amount of loss under this count, the facts related in the finding are deemed pertinent in connection with prejudice."[2]

Counts II, III and IV, and the proof under them, were clearly relevant to prove Counts I and V.

The USDA officials responsible for the wrongs done petitioner under Counts III, IV and V were McCurley and Dolson, also accused of ill-will, prejudice and bad faith under Counts I and V.

The period of the wrongs under Counts II, III, and IV preceded and extended through the periods of Counts II and V. All the claimed wrongs were done under color of the offices those persons held in the USDA, to the injury of petitioner's business. The same pattern was common to all five (5) counts, of concurrent and similar wrongs, by McCurley and Dolson in the exercise of their official authority over USDA grading service. (*Infra*, pp. 21-56)

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[1] (R. 115).

[2] (R. 120).

By denying petitioner the official grading under Counts II, III and IV, McCurley and Dolson were depriving the public of products with grade officially certified. Under Counts I and V no such injury to the public was involved. Findings that McCurley and Dolson were will to and did violate their official duty to the public to harm petitioner were, a fortiori, highly relevant to show a concurrent willingness, disposition and intent to harm petitioner under the other counts. The wrongs done under Counts I and V were not so clearly in violation of their official duties.[1]

Petitioner consistently stressed the relevance between the facts found under all five (5) counts.[2] That relevance will appear clearly in discussion herein of the specific facts proved under them. (*Infra*, pp. 21-56)

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[1] McCurley in forcing petitioner to re-work lots tendered under the contracts of sale, time after time, caused them to deteriorate and become loss. (Ct. F. 38, pp. 47, 48) McCurley was thus removing surplus eggs from the market beyond the amount petitioner had contracted to sell.

[2] *E.g.*, in referring to Counts II, III, and IV, Plaintiff's briefs to the Court below stated:

> "The difficulties plaintiff first had, in connection with grade labelling, and frozen egg and dressed poultry inspection service, are described herein initially. *The wrongful denials of such services by the USDA*—important in their own right—*are of even greater significance as preceding and foreshadowing the more drastic wrongs to plaintiff which followed.*" (Emphasis supplied) (Plaintiff's Main Brief, p. 14)
>
> * * * * *
>
> "All these wrongs to plaintiff are completely inconsistent with the honest judgment McCurley and Young were required to exercise as representatives of the Agriculture Department under the contracts, in making their inspections." (Plaintiff's Reply Brief, p. 48)

C. The Dismissal of Counts I and V

The Court below dismissed Counts I and V for a failure of proof, and for legal insufficiency of the facts found.

The Court in reinforcing its dismissal, made the unusual, unprecedented statement [1] in its opinion (App. 5) that

> ". . . plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty."

The Court's findings under Counts I and V for the most part adopt verbatim the findings of the Commissioner. Deviations occur in significant omissions and additions, frequently made without any exception by a party as a basis therefor.

The opinion wholly fails to portray the true facts, departing widely even from the Court's findings. It also indicates misapprehension of certain of the issues, and various misconceptions of the relevance of the facts the Court found.

These matters petitioner sets forth specifically in connection with each count while avoiding as far as possible repetition of what has been stated. (*Infra*, pp. 27-56)

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[1] This statement obviously refers to McCurley, as well as Dolson. Its reference to McCurley appears from a later decision where Court of Claims said:

> ". . . We cannot accept an allegation of prejudice or fraud against a responsible government official when based on anything less than evidence constituting clear and convincing proof. Nicholas & Company v. The United States, No. 98-54. *Ottinger* v. *United States*, 301 F. 2d 336 at 340 (1962).

Expressed conditionally in the opinion, the above condemnation became absolute when later in the opinion the Court removed the condition.

VII.

MOTION FOR REHEARING DENIED

Petitioner's attorney filed a printed motion for a rehearing which the Court summarily denied. (R. 235; App. 75)

VIII.

THE TRUE FACTS AND THEIR TREATMENT BY THE COURT

The various events which comprise the first five counts, although separated for pleading purposes, as they occurred constituted a unified and contemporaneous whole, mutually interdependent and confirmatory of each other. They are given such unity by a common thread of prejudice, hostility, and oppressive abuse of power by the same officials of USDA, over a 4-year period.

A. Count II—Frozen Egg Grading Service

In November of 1951 and again in January of 1952, petitioner made application on the USDA contract form for continuous grading service for frozen eggs at its Bushnell plant.[1]

Both these applications were approved by USDA in the months in which made. (App. 51) As of this time, application approval followed plant approval, and gave petitioner an immediate and unconditional right to the resident grading service specified. (R. 111-113; 7CFR 55.102(b), 1949 ed.)

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[1] None of petitioner's contracts for grading service had any definite termination date but were effective until cancelled. Repeated agreements were executed due to the changes in the name in which petitioner was doing business, or because of changes in the schedule of fees and charges set forth in the agreements.

The regulations then provided that an "application . . . may be approved only with respect to an official plant," in turn defined as one "in which the facilities and methods of operation therein *have been* found . . . suitable and adequate for grading service . . ." (Emphasis supplied) (7 CFR 55.2(y) 1949 ed.)

The season for breaking eggs was from January through July. (R. 117) McCurley's first move to furnish grading service occurred at the end of June 1952 when he proposed to license a plant employee whom petitioner intended to discharge for theft. Up to this point of time he and Dolson had been making various demands upon petitioner in disregard of the plant approval before application approval. For some time thereafter McCurley declined to designate anyone else for the plant on the ground that petitioner was trying to pick its own inspector; and, by way of reprisal, determined to appoint a Government employee as inspector rather than a plant employee as grader under bond to the USDA to faithfully perform his duties. (R. 113-117)

The use of a Government grader would be much more costly, not only due to higher levels of salary, annual leave, and other incidents of Government employment, but also because petitioner would be unable to make use of the resident Government-employed graders' time not occupied in official grading and related work. (R. 115)

McCurley reported the incident, in writing, to USDA as if in a spirit of perfect harmony he had promptly acceded to Mr. Nichol's objection to the individual involved in theft. (Def. Ex. 2, p. 20)

Petitioner broke eggs at the Bushnell plant for frozen egg products throughout the 1952 season but on a very small scale, (R. 117) because of the lack of official Government grading. (App. 21) The year 1952 was profitable for egg breaking. (R. 117)

Defendant sought to justify the denial of frozen egg grading during 1952 on the ground that plant inspection was necessary, following approval of petitioner's applications. It cited in that regard regulations which became effective April 1, 1952 and which, for the first time, made plant approval precede, rather than follow, application approval. (R. 25-27; R. 113)

Petitioner did not secure frozen egg grading service until January of 1953. (R. 117)

Petitioner excepted to the disallowance of any damages by the Commissioner and set forth in its exceptions a rational formula for the allowance of damages of $34,000.00.

The profit ratio on sales made in 1953 was applied to the volume of frozen eggs, which would have been produced, as a by-product of petitioner's shell egg business, had petitioner had official grading, and reduced by profits actually earned. (Pl. Excep., pp. 58-61)

This exception was not considered by the Court of Claims for reasons already set forth.

B. Count III—Consumer-Cartoned Egg Grading Service

From 1951 through 1955, petitioner repeatedly made application for and was granted in writing on the USDA's official form the privilege of having eggs in consumer cartons officially graded, and repeatedly petitioner's cartons and labels were approved. At no time did any USDA inspector assigned to petitioner's plants receive authorization needed to do such grading. As a result, petitioner sold practically no eggs in consumer cartons, and thereby lost the chain store market. (R. 45-50; Pl. Excep., pp. 61-62)

Respondent sought to justify the denial of this grading service on the specious ground that petitioner had not "made the services of a supervisor of packaging available." The regulations defined such a person as one authorized by the USDA to supervise grade labelling (7 CFR 55.2(i)) and the USDA was, therefore, the party to make such a person available, by a grant of authority never made. (R. 71; Pl. Exceptions, pp. 61-63)

Petitioner incurred expenses of close to $4,000.00 in expectation of this particular grading service, all of which was wasted, and asked for that sum to be allowed as a recovery. (R. 121, 122; Pl. Excep., p. 63)

C. Count IV—Poultry Grading Service

Petitioner made application for poultry grading service on the standard USDA form on January 9, 1952. Blueprints of the plant were submitted some time prior to May 15, 1952, but their approval was delayed for no apparent reason until July of 1952, well into the season, which begins in the last half of the year. (R. 122, 123)

Initial and final plant surveys were necessary for plant operation with official grading. The initial survey did not occur until October 6, 1952, and resulted in approval of petitioner's application. In this period of 10 months delay petitioner was constantly demanding poultry grading service. (R. 122-124)

Thereafter, Dolson and McCurley kept finding specious fault with the plant. At Mr. Nichols' request, his Senator, on May 13, 1953, wrote the Secretary of Agriculture asking that he see that petitioner be told once and for all what was necessary, so that it could make the required changes and obtain the needed service. (Pl. Ex. 15) Less than a month later, on June 10, 1953, final approval was given the plant. (R. 124)

A poultry grader, Julius Antoine, was assigned to petitioner July 6, 1953. Just as petitioner was about to start dressing turkeys, Antoine was hounded by USDA officials into resigning. (R. 143)

Antoine shortly requested re-employment. Dolson was willing to employ him but not to assign him to petitioner. (Pl. Ex. 26) No other poultry grader was furnished, and petitioner was never able to operate. (R. 125) Plaintiff sought a recovery of $4,500.00 representing 3 years idle use of plant equipment which cost $30,000.00. (Pl. Excep. pp. 63-65)

D. The Court's Opinion

The full and true story differs radically from the picture portrayed by the Court's opinion. Petitioner is expressly and by implication pictured as given to making heated, irresponsible and defamatory charges, increasingly extreme and intemperate, rather than substantiating the prior charges successively made as a substitution for substantiation of the preceding one. (App. 2)

The charges are described in terms of a quickly accelerating crescendo, beginning with a "heated protest" over the rejection of eggs under the contracts of sale, followed by "demands" that inspectors be relieved of their duties in grading petitioner's products. A climax is reached when "finally plaintiff alleged that officials (USDA) were in a conspiracy to put it out of business." (App. 2)

Speaking of this same "conspiracy" the opinion further states (App. 13) that, "Plaintiff has completely failed to prove such a design. It reiterates over and over that there was such a design but evidence to support the charge is lacking."

Unmentioned is the fact that the Court's Commissioner reported (R. 152):

> "There appears to be little doubt that some of the (USDA) officials were determined to destroy the business of Nichols, insofar as U. S. grade-standards were concerned; also that other business would have to be limited."

As if preposterous, and as a further instance of intemperate accusation, the opinion states (App. 3) that, "During the trial, plaintiff or its attorney, charged one of the inspectors who testified with perjury."

No such charge was made during the trial, but was made in briefs following the trial sessions, a charge which petitioner reiterates and herein demonstrates to be true. In

fact, as is shown, the Court's own findings so convict McCurley.[1] (*Infra* pp. 59, 60)

Mention has already been made (*supra* pp. 9, 20) of the opinion's statement that

> " . . . plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty."

Elaborating on that statement, the opinion goes on to say, (R. 177, p. 17):

> "Plaintiff has failed to prove that any official or any group of officials of the Department of Agriculture set out to wreck its business. It has failed to prove that any of them were arbitrary or capricious in their dealings with it, or in their conduct toward it; nor has it proved that any inspector was guilty of fraud in the grading of its eggs or did so improperly."

It is undisputed that the Tri-State Marketing Plan, which was destroyed by the assignment of Schoonover as a replacement grader, was highly successful from the very beginning after two years planning and organization by Mr. Nichols. Even including the latter part of the period of the Plan's operation when Schoonover caused it to operate at a loss, it yielded profits at an annual rate of approximately $40,000.00, and was a growing success up to the advent of Schoonover. The Commissioner so found, and defendant took no exception. (R. 156-158)

The opinion (App. 20) describes petitioner, in a fit of pique, in April of 1955 as having "decided to go out of business unless it could continue with the grading service it demanded." Having been denied "the terms upon which it wished to continue . . . " there and then, according to the opinion, petitioner by free choice, ended the business

[1] The record, and even argument by counsel fail to contain even a hint that such a charge was made in the course of the trial sessions. Petitioner cannot account for this statement in the opinion.

of three generations of the Nichols family, and the fruit of two years advance preparation and planning of the Tri-State Marketing Plan.

That conclusion is hardly consistent with the undisputed fact that petitioner continued in business for several years after its grading service contracts were cancelled (R. 158); nor is it consistent with representations by respondent's counsel to the Court in oral argument in November of 1961, that petitioner was on that very day still in business. (*Supra* p. 16) It is opposed by the findings of the Court, adopted verbatim from the Commissioner's report, and which the Commissioner in his report summarized by stating:

> "It thus appears that (USDA) was not only inviting plaintiff to terminate, but was in reality forcing plaintiff to terminate the service contracts."

This Court's rules require the opinion below to accompany a petition for certiorari, no doubt on the assumption that the opinion fairly reflects the case to be presented. While petitioner is not asking review of an opinion, the opinion may well vitally affect the Court's decision to review. The foregoing discussion of the opinion, therefore, is pertinent, as are the accuracy of the true facts as set forth specifically herein (*Supra* pp. 21-24; *infra* pp. 28-56).

E. The True Facts—Count I

1. Storage lots were of uniform and comparable quality

Petitioner had available to fill the contracts 117 lots, officially graded when stored. The USDA conceded the lots were of "high quality." (App. 38; Def. Ex. 2, p. 8)

Petitioner's eggs thus differed from eggs normally stored, which are generally upgraded current receipts, (run-of-the-mill). (App. 49) Good eggs do not deteriorate

very much while in storage, but poor quality eggs continue to deteriorate. (App. 47)

As the September 2, 1952 delivery date approached, petitioner checked on all the lots in storage, partially re-working them, and was satisfied that they would pass inspection. (App. 38, 39)

All of the lots stored were of uniformly high quality, with only slight variation, as shown by the certificates issued at time of storage. Such a finding was implicit in the comparisons made by the Commissioner's report of gradings at Peoria and elsewhere, since unlike commodities would not be comparable. Petitioner, nonetheless, by exception to the report, asked that this implicit finding be made explicit. (Pl. Excep. pp. 25, 26)

Extensive analyses of the quality of lots when stored were received in evidence and are undisputed. (Pl. Ex. 13 pp. 8-10; Pl. Ex. 189-196; Tr. 274-301) The lots which McCurley and Young rejected, knowing them to be petitioner's, were slightly superior to the lots they accepted without such knowledge, and other lots accepted elsewhere.

2. Court's failure to find comparable quality

Nonetheless, the Court made no ruling on plaintiff's exception asking for an explicit finding on this point. Instead the opinion speculated, as possibly accounting for the variations in inspection results, that (App. 6):

> " . . . perhaps the quality of the eggs offered was not the same."

3. Mr. Curley's solicitation and threat

Shortly before eggs were tendered for delivery McCurley told Nichols that he was going into the retail poultry and egg business at Springfield, and asked Mr. Nichols to fur-

nish him poultry and eggs "on credit." Mr. Nichols replied that he did business only on a cash basis. (App. 39)

It was not long after that McCurley told Mr. Nichols that storage eggs could not meet the requirements of the contracts. (App. 39)

The Court's findings on these conversations contain inaccuracies which conceal their vital significance. According to the Court, McCurley predicted that storage eggs would not meet the contract standards "without complete reworking". (App. 39)

The statement by McCurley that storage eggs would not pass inspection is based upon testimony of Mr. Nichols and Mr. Altheid, petitioner's plant manager. (Tr. 462-464; Tr. 346-348); a contemporaneous memorandum by Altheide recording McCurley's statements (Pl. Ex. 19-A; Tr. 348) and petitioner's early telegraphic complaint to the USDA about McCurley's grading. (App. 44, 45). In every instance, McCurley's prediction is described by the evidence as without qualification. McCurley made a flat prediction, saying nothing about reworking.

McCurley testified emphatically that he had made no statement of any kind concerning the difficulty of meeting the contract standards with storage eggs. (Tr. 840).

McCurley's testimony, instead of supporting the Court's neutralization of his threat, is demonstrated false by the Court's findings of the opposite.

The Court's finding is also ambiguous and misleading in that it fails to give the sequence of the two conversations, stating merely that they occurred, at "about the same time". All the evidence behind the finding shows that it was only after Mr. Nichols refused to sell his merchandise "on credit" that McCurley said the contract requirements could not be met. (Tr. 462-464)

4. Results on initial tender conclusively prove fraudulent grading

After petitioner had tendered 47 lots for inspection, some under contracts in the name of its broker, Sol Rich & Co. (App. 39), McCurley, after petitioner's initial tender of 47 lots, asked Mr. Nichols why petitioner was tendering eggs under the Rich Contracts. (App. 39)

As he knew Mr. McCurley from experience, Mr. Nichols, with a wisdom proved by later events, concealed petitioner's ownership of the Rich contracts. He informed McCurley that he had sold the eggs to Rich, (which was true,) and omitted to state that he had bought them back. (App. 39)

Mr. Nichols' apprehensions were soon justified.

McCurley's first inspections were of lots tendered under the Rich contract. He gave the lie to his own statement that storage eggs could not pass inspection, by accepting 11 consecutive lots at the very outset. (App. 39, 40)

Up to this point of time, McCurley was under the belief that petitioner had no interest in the Rich contracts. The inspections began August 25. A few days later, Mr. Altheide went over to Peoria where he told McCurley that the Rich contracts belonged to Nichols. (App. 40, 41; Tr. 325, 326, 466, 467)

Immediately inspection results were completely reversed. The remaining 36 lots tendered were *all* rejected. (App. 31, 39).

The Court's findings are in irreconcilable conflict. The initial 11 acceptances under Rich contracts are without dispute in the evidence. Yet the Court, on its own initiative, and without any basis in exceptions or evidence, made a finding that *only one* lot in the name of Rich was rejected on the initial tender.

The conflict thus occurring is shown below:

Finding Originating With Court	Court's True Findings
"Thirty-six of the 37 lots of eggs offered under the contracts of Sol Rich & Company for delivery at Peoria September 2, 1952, failed to meet the quality requirements specified in PY-61 and were rejected. (App. 31)	"Of the 47 lots tendered at Peoria for delivery September 2, 1952, only 11 lots were accepted under Rich contract 2732 and all other lots were rejected for failure to meet the requirements of PY-61." (App. 31)
	". . . inspectors Thomas S. McCurley and Robert L. Young commenced inspections (of the 47 lots) at the Peoria warehouse about August 25, 1952. The first few lots were found of very high quality . . . By August 30, 1952, samples from 47 lots had been inspected and 38 of these lots failed to meet the requirements. (App. 40, 41).

Clear proof of dishonest grading is supplied by the sudden reversal from 11 consecutive acceptances to 36 consecutive rejections.

Separated only by intervening knowledge of petitioner's ownership, the complete reversal leaves no conclusion possible except that the eggs were rejected *because* owned by petitioner.

5. Demonstrated falsity of explanation by McCurley and Young

In addition, that reversal reveals the real meaning of McCurley's advance statement that storage eggs could not pass inspection. What he meant was that *petitioner's* eggs would not pass inspection; he did not honestly believe there was any problem, as shown by his 11 consecutive acceptances at the outset.

Highly pertinent also is the falsity of the testimony McCurley and Young gave to explain this sudden reversal.

Both McCurley and Young testified that the first 11 lots were accepted because the sample cases were selected by warehouse employees rather than the inspectors and were not representative of the lot quality. (Tr. 822, 827, 828, 990) But the certificates themselves did not so indicate, as regulations require, when warehouse employees select the samples. (App. 34, 35, 41)

The falsity of their testimony was conclusively established. There was received in evidence a report from Dolson to his superior at Washington, dated September 16, 1952, shortly after the gradings on the initial tender, which stated: (Pl. Ex. 33):

> "After talking to you on the phone late yesterday afternoon I called Mr. McCurley for further information regarding the eggs being graded at Peoria for the School Lunch Program. Mr. McCurley advised me that on *each* and *every car they did draw their own samples.*" (Emphasis supplied.)

Thus McCurley and Young testified falsely in their attempt to explain the initial 11 acceptances.

6. Grading results elsewhere compared

Simultaneously with September 2 delivery at Peoria, petitioner tendered 8 lots at Burlington, Iowa, and 7 lots at Memphis for inspection and delivery at those places on the same date.

All 7 lots at Memphis were accepted. Only one (1) of the 8 lots inspected at Burlington was rejected. The tabulated results as of this time were as follows:

	Acceptances	Rejections
Memphis	7	0
Burlington	7	1
Peoria (Before knowledge of petitioner's ownership)	11	0
Total	25	1
Peoria (When lots known to belong to petitioner)	0	36

7. The gradings of Shearer and Dingman

Following petitioner's complaints to the USDA of Washington, Dale Shearer, Assistant to Dolson in Chicago, visited Peoria on two occasions on which he did grading. On one occasion he graded two lots which had been reworked, rejecting one and accepting the other. On a later visit he inspected 5 lots, all of which were accepted. (R. 45) This record of 6 out of 7 acceptances is at variance with Shearer's report that McCurley and Young were making proper inspections (App. 46), and in further contrast to the record of McCurley and Young.

The Commissioner found that the group of 5 lots were original unre-worked lots, (R. 98) and contrasted Shearer's own performance record with his testimony that re-working was required. (R. 98)

The Court modified the Commissioner's finding so as to find that the group of 5 lots were reworked. (App. 45) This modification is in conflict with other findings by the Court, showing that the lots must have been unre-worked because inspected when only unre-worked lots were available. (App. 42, 43, 45)

The Court in its opinion states (App. 6) that "No accusations are made against Mr. Shearer's integrity or im-

partiality." This statement is made following reference to Shearer's testimony that the inspectors were doing a good job in his opinion. The Court apparently overlooked the tsatement in plaintiff's reply brief in which plaintiff asserted (p. 41 fn. 1):

> "Somehow Shearer became transformed from a fair grader into a partisan witness by the time he testified."

Regulations of USDA required detailed memoranda made at the time of inspection, commonly called worksheets, to be preserved for the purpose of settling any future disputes concerning grading. (App. 37) To resolve the evidentiary issues created by the testimony of graders Dingman and Shearer petitioner subpoenaed the worksheets behind their gradings. The Commissioner made a finding to that effect (R. 98) which was unquestionably true; and also the further true fact that respondent never furnished the worksheets.

The Court for no apparent reason failed to make a similar finding. Its opinion, while stressing petitioner's failure to parate its candlers as witnesses, is equally silent about respondent's failure to produce official records made and maintained for just such an occasion, irresponsibly defended only by varied and conflicting statements by respondent's counsel, with which issue was taken by petitioner. (Tr. 1441-1447); Defendant's Requested Findings, p. 75; Tr. 1263) The failure to produce the worksheet is behind the certificate in Dingman's name is particularly strange in view of testimony elicited by respondent from McCurley and Kempers that only the worksheets would show who did the inspecting. (Tr. 859, 1187, 1194)

In view of the record it is clear that the Commissioner was right and the Court was wrong on the issue of the reworked or unre-worked character of the group of 5 lots. In any event, in view of the heavy proportion of rejections

by McCurley and Young of lots after they had been completely re-worked (51 out of 111; *infra*, pp. 37-38) Shearer's record would of 6 out of 7 acceptances provide another sharp contrast with the gradings by McCurley and Young, even if those 5 lots had been reworked.

Both the Court and the Commissioner found that Inspector William Dingman, who assisted McCurley and Young in inspecting the lots initially tendered, "signed certificates for 17 lots . . ." (R. 94, 201) The Court however in its opinion refers to "Mr. Dingman as having inspected" these lots (of which 14 were rejected) and goes on to say (App. 7) that "No accusation is made against him."

The 17 certificates issued in Dingman's name, with 3 exceptions, related to lots graded by McCurley and Young. The official certificates received in evidence so demonstrate, as petitioner pointed out to the Commissioner before he made his finding. (Objections of Petitioner to Defendant's Requested Findings (pp. 54-60)). The findings of both the Court and the Commissioner, therefore, were deliberately confined to "signing" of certificates, rather than "inspecting" the lots whose quality they certified, and the opinion's statement represents a misconception of the facts.

8. Refusal to inspect lots not previously tendered

Petitioner entered into various contract modifications with the USDA extending the time for delivery, with certain penalties attached. Reduction was made in the contract, increasing progressively with added delay in delivery. The penalty was a minimum of over $1,000 per day, and might exceed $4,000 per day. (App. 28-31).

To avoid the costly delay involved in reworking petitioner tendered other lots, in storage in the Peoria warehouse where the inspections were being made. McCurley refused to inspect them, and, instead required that peti-

tioner re-work the rejected lots and all other lots which might be tendered, before he would inspect them. (R. 199, 203)

This was a clear violation of the contracts which obligated the USDA to inspect lots as tendered, and expressly denied the inspectors any authority to accept or reject the lots tendered. (App. 22-26)

9. Refusal to reinspect

Petitioner also asked repeatedly that the lots rejected on initial tender be re-inspected, by enlarging the sample, and regarding the enlarged sample—a standard procedure authorized by regulation and part of the basic grading process.

All requests for re-inspection were denied. Petitioner was forced to and did re-work all lots (with the exception of certain lots accepted by Shearer, (discussed, *supra*, pp. 33, 34), re-work all lots of eggs as a condition precedent to their further inspection.

10. Inadequate justification by Court of reworking requirement

The inspections made at the time the eggs were stored show that a substantial number of the lots had loss slightly in excess of the .3% maximum loss permitted.[1] (App. 38)

The Court in its finding seeks to justify McCurley's requirement of re-workings as being based on the loss factor shown by inspections made at the time of storage. (App. 43) The opinion does the same, stating that in view of loss shown in some of the lots when stored, "It was not un-

[1] The Court's Finding (App. 38), contains even a mathematical error, adding 27 and 4 to reach a total of 40, rather than 31; in addition it treats the lots showing loss in excess of .3% as being a proportion of 59 rather than the 89 lots stored. (Pl. Ex. 186, 187, 188, 198, sheet 12)

reasonable . . . for the inspectors to require them to be reworked . . ." (App. 4)

But McCurley had no such reason. Statistical studies comparing the gradings of the lots were made up for the purpose of the case, from petitioner's records. Neither McCurley nor anyone else knew at the time of the grading, what these various percentages were. McCurley could not and did not know whether the eggs in storage had been previously graded, or where they came from, let alone the gradings given them when stored. He himself so testified. (Tr. 912)

McCurley also testified that he had never made any re-working requirement. Here again the Court's erroneous justification only points to testimony which its finding condemns as false. (Tr. 839)

II. Results after re-working

On subsequent tenders at Burlington and St. Louis, there were a few lots rejected. After re-working, not a single one was rejected.

At Peoria, 111 inspections were made by McCurley and Young of lots completely re-worked with only 60 resulting in acceptances.[1] (Pl. Ex. 190)

[1] The foregoing figures exclude the 7 lots inspected by Shearer without re-working. The Burlington experience after the initial tender was slightly less favorable than before. This may be accounted for by the BB candler. Also the record indicates that following the initial tender Mr. Dolson looked into the Burlington situation and conceivably shaped the attitude of the inspections there. (Pl. Ex. 33) Petitioner is, however, unable to assert that there was any wrongdoing other than the use of a wrong candler, although Mr. Nichols testified that he believed the eggs should have passed and in this respect the statement in the opinion that "plaintiff does not complain" about rejections at other places (R. 165) is misleading. It is also inconsistent with its condemnation of plaintiff for making unfounded charges, petitioner had no practical way of verifying or substantiating. Petitioner is damned for making unfounded charges; when it and then damned when it doesn't.

The record is devoid of any explanation on behalf of respondent of most of the rejections of re-worked lots. (Despite all the insistence that reworking was all important).

Respondent, through testimony by McCurley, sought only to explain the rejection of 16 of 23 lots re-worked at Avon and Bushnell and returned to Peoria for inspection. According to McCurley, upon their return the lots were left in the hot sun on the warehouse unloading platform with samples taken into the inspection room for grading; this situation, according to him, being due to petitioner's desire to learn whether the lots would be accepted before bringing them into the warehouse. (Tr. 835, 836)

That testimony was demonstrably false. His own certificates of those inspections described the *lots*, not just the samples, as being under refrigeration in the warehouse. (Pl. Ex. 187) Also, all lots went into the warehouse although 16 of the 23 were rejected. (Def. Ex. 173A) McCurley would be grossly in violation of his duties to use cooled and unrefrigerated sample cases as representative of the remainder of a lot in the hot sun; and Mr. Nichols, undergoing a tremendous expense, would have been irrational to have allowed such a condition to exist, let alone direct it. Thus, the partial explanation made by respondent of the rejection of reworked lots was both false and irrational.

The results of the inspection of re-worked lots by McCurley and Young, compared to experience elsewhere are shown below: (App. 40-43)

	Acceptances	Rejections
Burlington	4	0
St. Louis	1	0
Total Elsewhere	5	0
Total Peoria	60	51

12. Petitioners failure to produce its candlers and have its candlers testify

The Court's opinion stressed the failure of petitioner to have its candlers testify, who did the re-working, stating (App. p. 6):

> "When plaintiff reworked the eggs, it was necessary to examine them, reject the 'checks' and 'dirties, leakers and loss' and candle so many of the others as it deemed necessary. Its employees who did this work were in an excellent position to testify whether or not the rejections by the inspectors had been improper, but plaintiff did not call them to testify. We regard this as quite significant."

At the time, petitioner was seeking to complete performance rather than to prepare for a law suit. The re-working was for the purpose of having the eggs accepted and the candlers, thirty or forty in number, were employed and worked for that purpose. Their testimony would naturally have been that they did the job that they were employed for. Most of the lots re-worked (60 out of 111) were, in fact, accepted despite the use of the BB candler and the obvious unfairness and dishonest grading by McCurley and Young.

It would, of course, be impossible to trace any given case of eggs candled into a given inspection even if the employees were available at the time of the trial sessions which does not appear.

Respondent apparently recognized the futility of such a parade of witnesses. By its discovery motion filed June 5, 1956 it sought all pertinent evidence relating to the quality of the eggs tendered under the contracts stating that much information was in the possession "of the candlers employed by plaintiff . . . who subsequently re-worked lots which had been rejected . . ." (Def. Motion, p. 2)

Petitioner's response made no objection. (Res. p. 1) and such discovery was had.

Petitioner was thoroughly investigated by respondent and had full access to petitioner's employees yet it called no such witnesses itself. (App. 56) The record is devoid of any consideration having been given to such a futile pursuit, except as an afterthought by respondent in its brief to the Court of Claims.

In Defendant's Requested Findings of Fact filed with the Commissioner no such point was made. Instead in a note to the Commissioner (p. 23) respondent decried plaintiff's failure "If a lot had failed to pass inspection, to have one of plaintiff's own candlers re-inspect the lot and make a note if his inspection results differed from the inspector's grade. Or, he could have simply stationed one of his candlers beside the inspector to check his results after they were arrived at."

This contention respondent abandoned before the Court, coming up instead with the new idea that the candlers should have been called as witnesses, and by petitioner.

The Court overlooks the fact that Mr. Nichols and Mr. Altheide, the plant manager, both knowing the overall situation, testified positively that the eggs should have passed inspection. (Tr. 349, 590, 592).

While stressing the failure of petitioner to call the candlers, the Court is silent concerning respondent's failure to produce official records maintained for the very purpose of providing evidence to resolve controversies concerning the fairness of egg gradings. (Supra p. 34) In fact, the Court failed to adopt the Commissioner's finding in that regard, even though indisputably true.

13. The disputes clause and petitioner's failure to take formal appeal

The USDA regulations regarding egg grading authorized a permissive appeal from any given official egg inspection. The regulations were general in terms, providing that the appeal grading should be made by an inspector other than the one whose grading is appealed, but contain-

ing no further information concerning the procedure used in making the appeal grading. (App. 35, 36) The Shell Egg Graders Handbook (which petitioner had not seen until some time after performance had been completed) gave more specific directions to the graders themselves.

The dis[illegible]s clause required that petitioner submit its complain[illegible] the contracting officer for decision by him (App. 27). Petitioner did so by its complaints through Washington, alleging bias and unfairness on the part of McCurley and Young and asking that other inspectors be substituted for them. (App. 44, 46)

Officials in Washington suggested that petitioner appeal the gradings by McCurley and Young. Petitioner endeavored to find out the procedure on appeal, having been told by McCurley that the inspection appealed from would be taken into consideration and be given weight in the appeal grading. (Pl. Ex. 11, 12)

The practice as at the time was to average the inspection appealed from with the inspection made on appeal the average being the final appeal grade. (Tr. 757, 758, Defendant's Requested Findings of Fact, p. 74) Thus if the initial grading appealed from should contain .8 loss, then .4 loss would inevitably be included in the final grade on appeal, even if the new sample showed no loss at all.

Petitioner unwittingly did appeal by requesting re-inspection by graders other than McCurley and Young, but made no such request formally, nor spoke in terms of "appeal." Oral requests were adequate. (App. 36, 43).

In its opinion the court stated: (App. 6)

> "(R. 166) . . . Such an appeal would have provided direct evidence of fraud, if fraud had been practiced. No appeal was taken. Instead of taking an appeal, plaintiff asked that McCurley and Young be replaced by other inspectors, but this it had no right to do, until it was shown they were acting improperly. An appeal should have disclosed whether or not they were acting improperly, but no appeal was taken."

The foregoing statement is largely without foundation. Petitioner's failure to take formal appeal, even if permitted by the disputes clause, in no way kept USDA from obtaining evidence of fraud. USDA could have taken an appeal itself and was free to investigate in any manner it saw fit. The problem of McCurley and Young was a continuing one, not confined to any specific grading, and called for the administrative correction of which the disputes clause was, by the contract terms, the mandatory remedy. The contracts did not mention the permissive appeal grading system. The investigations on petitioner's complaints was not completed until long after performance had been made. (R. 00) Petitioner was looking forward to this promised investigation of its complaints and urged haste. (P. Ex. 58)

14. The B B candler

The contracts of sale, by incorporating United States Standards For Quality of Individual Shell Eggs, (App. 23), also incorporated the requirement that the candler used in inspections to deliver from 350 to 450 foot-candles of light at the candler opening, that opening to be approximately 1⅛th inches in diameter. (App. 34)

After all deliveries had been made under the contracts, petitioner discovered that the USDA in all inspections at all points had used a "B B" candler with greatly excessive candle power, and concentrated the light beam unduly by an aperture opening of only 13/16th of an inch. The result was to make certain defects in the eggs more pronounced and to widen the range of flaws which can be observed. (App. 46)

Petitioner had contracted to supply eggs having a certain appearance under a certain light. Its eggs were judged under a light changing their appearance, and making flaws otherwise imperceptible become apparent, as well as mag-

nifying them. The result was to upgrade the contract specifications.

Instead of recognizing petitioner's complaint in this regard as a breach of contract, with no element of discrimination involved, the court in its opinion stated plaintiff made complaint in this regard "in order to show partiality . . ." (App. 7)

Petitioner cannot state, because of inherent impossibility, any precise or approximate measurement of the down grading of plaintiff's eggs which unquestionably took place because of the use of the B B candler. (App. 46)

F. The True Facts—Count V

There is no genuine dispute in the evidence concerning the major facts under Count V. Differences exist between the findings of the Commissioner and those of the Court. They are caused almost entirely (with the exception of the treatment of Dolson's threat to put petitioner out of business) by the Court's failure to adopt certain findings of the Commissioner based on undisputed evidence, and to which respondent, for the most part, did not except.

The difference in the findings is in part attributable to the Court's implicit rule of law that the USDA could discriminate against petitioner by applying to it, without regard to uniformity of application to other concerns, a policy of the Poultry Branch of the USDA to have government employed graders supervise and replace licensed plant employees; and that despite the fact that this policy of the Poultry Branch was arrested and suspended by the USDA before it became effective.

In its opinion the Court ruled that petitioner had voluntarily cancelled its grading contracts (App. 20). The Commissioner found instead:

"It thus appears that the PMA was not only inviting plaintiff to terminate, but was in reality forcing plaintiff to terminate the service contracts." (R. 151)

The Court's ruling, and the Commissioner's finding set forth above, were based on correspondence between petitioner and USDA concerning which both the Court and the Commissioner made substantially identical findings. (App. 68-74; R. 150-155)

These matters are discussed specifically below.

1. Dolson's threat

The high-handed arrogance manifested by Dolson's denial to petitioner of grading services generally available, and promoted and encouraged by the USDA in the public interest on a self-sustaining basis, appeared once more when petitioner was barely over its troubles in making deliveries at Peoria under the contracts of sale.

Both Commissioner and the Court found that Dolson threatened to put petitioner out of business in a conversation with Mr. Nichols in his office at Avon, in the course of which Mr. Nichols had stated he intended to file a claim against the government.

The Court, in its finding, intermingles and confuses that conversation with a different incident—an argument about the denial of grading service, and petitioner's compliance or noncompliance with regulations entitling it to them.

The argument about grading service the Commissioner reported as a separate incident, and respondent took no exception. (R. 116)

Set forth below are the corresponding findings of the Court and Commissioner:

Commissioner's Findings

"Shortly thereafter, (November 12, 1952 (App. 32) when deliveries were completed under the contract of sale) Nichols advised Regional Supervisor Dolson that he intended to file a claim against the Government, and Dolson threatened to put plaintiff out of business by the exercise of his authority to supervise the administration of the production and marketing inspection and grading service." (R 134)

* * * * *

"On December 10, 1952, Dolson and McCurley visited plaintiff's plants at Avon and Bushnell. Dolson advised Nichols that he would get service, but that he would have to comply with regulations to the letter of the law." (R 116)

* * * * *

Court's Single Finding

"Following complaints from the plaintiff that the (USDA) graders were biased and prejudiced in grading eggs '. . . under the contracts . . . an investigation was made by the USDA.

"Shortly thereafter, Mr. Nichols, Mr. Altheide, plaintiff's plant manager at Peoria, Mr. McCurley, the Supervisor for the State of Illinois, and Mr. Dolson, the Supervisor for the 12-state area comprising Illinois, were discussing plaintiffs complaints. They got into quite a heated argument, Nichols charging that he had not received fair and impartial inspection, and Dolson replying that Nichols was trying to pick his own inspectors, and was trying to tell the Government what to do, but he was not going to let them do it, that he was going to tell Nichols what to do, and that he had better learn then and there that he had to do it. Nichols said he was going to file a claim against the Government, and Dolson said that he was going to put Nichols out of business." (App 56, 57)

All the evidence in the record supports the Commissioner's findings and opposes that of the Court.

The earlier conversation, in which the threat was made, occurred shortly after November 12, the date of completion of performance, rather than the later date of completion of the investigation. It was not heated. After the threat, Mr. Nichols simply walked out of the office telling Dolson,

that he felt Dolson had been trying to put him out of business for a long time before hand. The two men were alone when this conversation was held. (Tr. 487, 488)

The later conversation occurred December 10, 1952. It is evidenced by a memorandum made by Mr. Nichols, immediately after the argument, recording in complete detail what was said. (Pl. Ex. 200) That memorandum, obviously drawn upon by the Court in its vivid description of the two incidents as if one, (App. 11, 12), shows that at this time McCurley and Altheide were also present, that it was Dolson, in the company of McCurley and Altheide, rather than Mr. Nichols, who walked out of the office when the argument ended; that nothing was said about the filing of a claim; and that the controversy concerned only the question of petitioner's compliance or noncompliance with regulations relating to grading service, with Dolson insisting that the law and regulations must be met. (Pl. Ex. 200, Tr. 489-494)

As a result of confusing the two conversations as if one, Dolson's oppressive threat was transformed into a highly principled stand for law and order.

The first treatment of the two conversations in the opinion is consistent with the Court's finding (App. 72):

> "Shortly after all deliveries had been made under that program, Mr. McCurley, the Supervisor for Illinois, and Dolson, the Supervisor for the Chicago area, comprising 12 States, including Illinois, came to one of plaintiff's plants where they had a discussion with Mr. Nichols and Mr. Altheide, the Manager, about plaintiff's complaints of unfair grading. The discussion became quite heated, Mr. Nichols complaining of unfair grading, and stating that he was going to file a claim against the Government, and Mr. Dolson replying that Nichols was trying to pick his own inspectors, and that he was not going to let him run the Department, but the Department was going to tell him what to do and he had better do it or he was going to put him out of

> business." However, Nichols says, after lunch, when Dolson came back to the plant, tempers had cooled, and he acted very much like a gentleman."

Thus, according to the Court, the heat of the argument provoked Dolson into a threat related to the whole subject matter of the discussion, which included compliance with law and regulations, AS WELL AS the filing of a claim.

But even this gentle and considerate treatment the Court soon exceeded. Two pages later in the opinion, the filing of a claim is not mentioned. Instead the Court refers (App. 67) to:

> "... Dolson's remark that plaintiff had better do what the Department directed him to do or they would put him out of business—"

The Court's misconception of the true nature of Dolson's threat, as shown above, was obviously a prerequisite to its ruling that "plaintiff has completely failed to prove . . . a design" to put plaintiff out of business (App. 13).

It is a fair assumption that this same misconception colored the Court's appraisal of discrimination and retaliation practiced against petitioner following Dolson's threat.

2. Reprisals against petitioner prior to contract termination

The opinion further poses the question which it could have, but did not, answer, by stating: (App. 72, 73)

> "If Dolson meant to carry out his threat to put plaintiff out of business through unfair grading of its products, as plaintiff alleges, it would seem he would not have waited until April 15, 1955, to set about doing so."

The Court's own findings show that Dolson did not wait until April 15, 1955. Almost immediately petitioner's shell egg grading service was reduced and for a large part of the time completely eliminated.

Throughout most of 1952, and until January of 1953, petitioner had three full time resident shell egg graders, one at Bushnell and two at Avon.

About the end of January 1953 Mrs. Richter at Avon resigned. Petitioner immediately applied for another grader as a replacement. (App. 62)

In that same month of January 1953, McCurley took away from Mrs. Chambers her stamps and government forms, so as to prevent her from certifying the grade of shell eggs.[1] No reason was given her for this action and no complaint had been made about her services. This suspension was in violation of regulations giving a licensed grader procedural rights to notice and hearing. (App. 57, 58; R. 135, 137; 7 CFR 55.35 (1949 ed.))

On March 12, 1953, Harry Brown was suspended because of the Weinberg incident (discussed *infra* p. 50). Petitioner was left with no resident shell egg grading service at all despite its two contracts, each requiring USDA

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[1] The Court found with no supporting evidence that Mrs. Chambers was permitted to grade but could not issue grading certificates. (App. 57, 59). All the evidence in the record compels the conclusion that the Commissioner's findings on this point were correct, to the effect that Mrs. Chambers issued "dummy" certificates of no value to petitioner, as a basis for assessing and receiving administrative charges based on the volume of eggs that went through the plant but which she did not grade. (Tr. 195-197, 545-547; Pl. Ex. 184, 185, 208) (R. 134-137)

Until June 1, 1954, when Kilian was assigned to petitioner, for the most part there was no other grader available to sign certificates for gradings done by Mrs. Chambers. Kilian remained in petitioner's plant until shortly before all contracts were cancelled, and both he and Mrs. Chambers testified that he had no supervision or official relationship to her in her work of any kind. Tr. 230, 204, 205. As a consequence, even if Mrs. Chambers had been permitted to grade without issuing certificates, the inability of petitioner to obtain a certificate made that right valueless for most of the time. The Court itself found (App. 164) that Kilian "never supervised the grading performed by Mrs. Chambers."

to furnish adequate grading at the plant covered, and such service was essential to its business (App. 21). Petitioner was required to use graders, operating on a fee basis out of Springfield and Chicago, when and if available. (App. 62)

The service after Dolsons threat is summarized by the table below:

SHELL EGG GRADING SERVICE FURNISHED PETITIONER JANUARY 1954-MAY 3, 1955 AFTER DOLSON'S THREAT OF NOVEMBER 1952.

Period	Number of Graders	Graders Names
First part of January 1953	3	Chambers, Richter, Brown
January-March 12	1	Brown
March 12-June 10	0	
June 10-June 24	1	Ogden
June 24-July 3	0	
July 3-November 20	1	Antoine[1]
November 20-April 1, 1954	0	
April 1-April 14 (approx.)	1	Schulte
April 14-June 1	0	
June 1-April 15, 1955	1	Kilian
April 15-May 3	1	Schoonover

[1] Antoine resigned because of annoyance with constant carping by USDA officials. He reconsidered and requested reemployment. Dolson would employ him elsewhere but not at petitioner's plants (App. 63; Pl. Ex. 26), although as events proved, petitioner was to be without any shell egg grading service from Antoine's resignation from November 20, 1953, until April 1, 1954, 5½ months.

Thus, in the period March 12, 1953 and June 1, 1954—approximately 14½ months—petitioner had no resident shell egg grading service whatsoever for 9½ months approximately.

3. The Weinberg incident

The Weinberg incident arose out of the sale of eggs by petitioner to Weinberg Brothers, a large Chicago dealer, which were transported to Laredo, Texas. Brown had graded the eggs at Avon and a new trainee, USDA inspector Schrimsher, had issued certificates at Laredo claimed to relate to the same lots, showing them to be of much lower quality. (App. 59, 60)

Brown was investigated, suspended and persuaded to resign over a technicality, just about the time Schrimsher was promoted. No investigation was made of Schrimsher. (App. 61, Tr. 778, 1301, 1321; Pl. Ex. 38, 232)

Weinberg took Schrimsher's deposition in Laredo, where he was cross-examiner by petitioner's attorney. Thereafter the USDA forbade Schrimsher sign the deposition, even though when read back to him, he admitted his testimony was faithfully recorded. (App. 61, Tr. 381-388, Pl. Ex. 145-148, 192A)

Excusing this conduct by USDA, the Court ruled, as if it had never heard of cross-examination, (App. 16):

> "Schrimsher was Weinberg's witness, no doubt, and his testimony must have been unfavorable to Nichols. If it was never put in evidence, so much the better for Nichols."

4. The replacement of Kilian by Schoonover

Under date of March 23, 1955 petitioner by letter to respondent's counsel described its statistical study of egg grading at Chicago, explaining how it portrayed fraud, and asking that the schedules and study be audited and analyzed

for accuracy. (Pl. Ex. 14)[1] This fact was communicated to one Ward Wagner, Washington USDA official. (Tr. 262)

By this time Kilian had been petitioner's resident shell egg grader for about 9 months, a period of relative peace and harmony for the first time since 1952 (App. 66).

About ten days later Wagner appeared at Bushnell and Avon. He took the temperature of a lot of eggs, and his reading differed widely from an earlier reading by Kilian. Official weather bureau reports showed Wagner's reading to be radically wrong. (App. 65)

Even had Kilian been in error, such a mistake was of no possible benefit to petitioner. (Tr. 234) Nonetheless because of this incident, Dolson replaced Kilian with one John Schoonover from Chicago, around April 15, 1955. (App. 66)

5. Schoonover's misconduct

The opinion indicates a misconception of not only of the uncontradicted evidence concerning Schoonover and the effect his replacement had upon petitioner, but even the Court's own findings.

Before Schoonover, the Tri-State Marketing Plan was a growing success. (App. 64, 65; R. 84-86) As soon as Schoonover replaced Kilian it became an immediate failure. Schoonover did not pass a single lot of eggs (App. 67). He did little work despite the congestion in the plants resulting from his rejection of eggs sold while eggs were coming in, one day doing no work at all; and so disrupted the Tri-State Marketing plan that petitioner was forced to terminate it even before cancellation of its contracts. (App. 66-69; R. 146-151)

[1] The USDA consistently refused to verify or dispute the study. App. 39

The evidence is uncontradicted that the eggs Schoonover inspected came from the same sources, were of the same general quality and were handled the same as were the eggs marketed during Kilian's tenure (Tr. 341, 343, 409, 1524, Pl. Ex. 203).

The Court ignores all these facts; and the additional fact that Schoonover's sitdown strike gave petitioner only the appearances of shell egg grading service despite the fact it had two contracts in effect, one for each plant, and each obligating USDA to furnish an adequate number of graders.

Schoonover was an experienced egg grader, having had a long association with the industry in Chicago, working for private concerns and the Chicago Merchantile Exchange (Tr. 1012). The USDA gave him a certificate of merit for "especially meritorious service . . . beyond the normal call of duty . . . in the rapid but accurate grading of an exceptionally heavy volume of eggs under extreme pressure of time, and other adverse working conditions." Thjs especially meritorious service was performed for dealers in Chicago and the Chicago Merchantile Exchange (Tr. 1286, 1287).

In desperation, petitioner requested a waiver of service, which would have meant withdrawing Schoonover from the plant, with no USDA service, but leaving the contracts for grading service with USDA still in effect. (App. 69, 70). The terms of the contract so permitted, it being the plant operators prerogative to determine when he deemed service necessary (Pl. Ex. 40, 44; Tr. 1134, 1135, 1398, 1420, 1421). This would have permitted petitioner to continue sales, largely to the Army, with Army inspection (Tr. 536). Nonetheless, the USDA kept Schoonover in the plant until the contracts were cancelled. (App. 70, 71).

The opinion disregards these facts in their entirety.[1] (App. 13, 14)

6. Cancellation of contracts

The Court ruled that petitioner had voluntarily cancelled the contracts as part of a plan to go out of business. (App. 20) It has been previously pointed out that plaintiff petitioner did not go out of business and accordingly had no such plan, and that any such plan would have been irrational. (Supra)

That ruling of the Court was predicated on an excerpt from petitioner's letter of April 27. (App. 20) That excerpt, read with the rest of the letter had no such meaning; and in any event, it was followed by later telegrams, prior to cancellation, which made it clear petitioner had no such desire or intent. (App. 70-72) It was those later telegrams which caused the Commissioner to find that the notice of cancellation from USDA of May 3, 1952 "appears to completely ignor plaintiff's clarification telegrams. . ."

The Court's ruling about petitioners intent to go out of business is further contradicted by its own findings of plaintiff's immediate protest of the cancellation and negotiations carried on to obtain nondiscriminatory service. (App. 72-74)

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[1] The opinion, referring to a joint inspection made by Schoonover and Kilian, states that Kilian because jointly working with Schoonover, was guilty of fraud, as Schoonover was. The Court misconceives joint grading. One inspector, grading certain of the samples, could find enough wrong to reject a lot. The two inspectors did not each look at the very same eggs. (App. 13)

The Court further discusses Schoonover's requirement that petitioner's employees do all his work, except grading, as if that were petitioner's complaint. This was only one bit of evidence, not petitioner's complaint. (App. 14)

The artificiality of attributing the cancellation notice to petitioner' wishes, as expressed to the USDA, is shown by the fact that the contracts relating to Bushnell were cancelled as well as Avon, despite petitioner's telegram of April 29 expressly stating it wished no change (like waiver of service at Avon) with respect to the Bushnell plant. (App. 71)

The evidence is undisputed that during the furor caused by Schoonover's assignment to petitioner, petitioner's attorney at the outset contacted USDA officials in Washington to take the matter up with them; that they stated they would look into the matter; that while the flurry was going on they would not receive communications from him, and cancelled the contracts without communicating with him. Plaintiff by way of exception to the Commissioner's report requested findings to that effect (Pl. Excep. pp. 76, 77). The Court made no ruling on and apparently did not consider that exception.

7. The refusal to reinstate the contracts on nondiscriminatory terms

Up to the time of the termination of the contracts Mrs. Chambers had been a fully licensed bonded frozen egg grader certifying here gradings as licensed. (App. 59) From 1953 on this was the only grading service petitioner had with which there was no trouble.

USDA declined to reinstate grading service except on terms especially applicable to petitioner, and which did not permit Mrs. Chambers to grade frozen eggs, but only "to supervise egg processing operations under the contract" (App. 72-74).

The Court in its opinion justifies this proposal as embodying Instruction 918 (App. 10, 19).

That instruction was an internal one representing the views of the Director of the Poultry Branch of the production and marketing administration at the time issued, May 21, 1952. (App. 53-56)

The Commissioner found, and the fact was undisputed, that on January 19, 1953 that program was cancelled by the assistant administrator, superior to the Director of the Poultry Branch (R. 132).

The abortive program embodied in Instruction No. 918 was never made a regulation and never applied, except to plaintiff. Instead, as USDA official Miller testified (Tr. 1133) the substitute policy announced by the Assistant Administrator was followed which provided that the USDA should "maintain existing arrangements with individual plants and . . . grant new requests for service in keeping with the pattern now prevailing within the community, state or region.

It was regularly applied to petitioner to deny petitioner bonded grading service on a discriminatory basis, causing the Commissioner to award petitioner damages therefor, and to find (R. 156, 157, 64):

> ". . . PMA was imposing a policy which allowed no bonded graders for Nichols, but was not applying the same policy to other operators."

The Court for no stated reason failed to find that Instruction No. 918 was revoked. It also made no findings concerning the discrimination practiced against petitioner in refusing bonded grading service.

The proposed authorization to Mrs. Chambers permitting her to grade but not to certify quality was illusory. It was designed to relegate her to the status of a limited licensee, and apprentice under the regulations. (7 CFR 55, 34 (1949 ed.))

Those regulations required that the frozen eggs be "produced under the supervision of an inspector", and that the inspector thereafter certify their grade. Since petitioner would have no inspector in the plant, to supervise the breaking of the eggs to be frozen, the result would have been, as a practical matter, no official grading of frozen eggs.

The Commissioner made a finding concerning those regulations, which was unquestionably accurate in its quotation of them. (R. 128) That finding serves as a framework compelling the conclusion that in its contentions that bonded graders were subordinate to government-employed graders, the USDA, and the Court in accepting that contention, was confusing limited licensees with bonded graders, only the latter being in a subordinate position. The Court in its corresponding finding, omitted the Commissioner's finding with reference to limited licensees, thus leaving the situation confused. (App. 53) That omission further led the Court into assuming that the regulations were in terms which permitted government-employed graders to supervise bonded graders, consistently with the revoked Instruction No. 918 on which it relied. (App. 53)

REASONS FOR GRANTING THE WRIT

In the decision below, the Court denied petitioner the benefit of well-established rules of law, applied as a matter of routine in favor of parties whenever invoked by the facts.

The effect of the decision is to permit the Agriculture Department to engage itself in discriminatory practices affecting the marketing of agricultural products though charged by law with the duty of preventing such practices.

The decision also permits oppressive action discriminatory in character to be visited by the Executive branch of the government on the public in violation of the legal protection afforded by the Administrative Procedure Act (5 USC 1001 et seq.).

The Court's decision was rendered in disregard of the facts, as well as accepted principles of law.

The facts thus disregarded include even those found by the Court itself.

They also include those reported by the Commissioner and facts established by undisputed evidence. In the course of its disregard of those facts, the Court also disregarded contentions of petitioner concerning the facts and their significance.

Paralleling and accentuating the error caused by its disregard of facts, were findings made by the Court, with no foundation in the evidence, having the effect of changing radically the character of other facts found by the Court.

The totality of the foregoing errors, while individually grievous, in combination, amount to a denial of the due process guaranteed petitioner by the Fifth Amendment in that

1. Petitioner was denied a full and fair hearing.
2. Petitioner was denied the equal protection of the laws.

Compounding that denial of due process, the Court expressly stated in its opinion that petitioner was to be severely condemned for making unfounded charges against government officials doing their duty.

Paradoxically, this is in itself an unfounded charge, occasioned by the Court's own denial of due process.

The Court of Claims is a Court of first instance. Petitioner has had no hearing elsewhere, the Court's decision having nullified the effect of the Commissioner's finding on the merits in petitioner's favor.

If certiorari is not granted, it will mean that petitioner and persons associated with it will have been ruined and defamed without a hearing. Moreover, the instrument to

that end will have been the very Court established by Congress to provide protection against such injustice.

The foregoing reasons for granting the writ are substantiated in petitioner's argument set forth below.

ARGUMENT

Recovery Under Count I Should Have Been Allowed

It is settled law that petitioner was entitled to the honest judgment of McCurley and Young, *Ripley* v. *United States*, 223 U.S. 695 (1911) and accepted by the Court of Claims. *Edwards* v. *United States*, 80 Ct. Cl. 118 (1934).

Equally well settled is the rule of law that a purchaser, who fails to comply with the contract provisions regarding inspection excuses the seller from the condition of inspection and in effect accepts the goods. *Reading Steel Casting Co.* v. *United States*, 268 U.S. 185 (1925); *Standard-Knapp Corp.* v. *United States*, 108 Ct. Cl. 270, 70 F. Supp. 132 (1947); *Heid Brothers* v. *United States*, 65 Ct. Cl. 87 (1928) and *Heid Brothers* v. *United States*, 69 Ct. Cl. 704 (1930).

The Restatement of Contracts has summarized the rules of law applicable to inspection, stating, Section 303:

> "Where a certificate (of quality) is a condition precedent to a duty of immediate payment for work, the condition is excused if (the person to make the certificate) . . .
>
> (d) fails to make proper examination of the work, or
>
> (e) fails to exercise an honest judgment . . ."

The issues of Count 1 may be simply disposed of, on the ground of the use of the B B Candler, which in effect upgraded the contract specifications.

They may also be disposed of by the refusal of McCurley to inspect lots tendered under the contract. The duty of the USDA was to inspect, and failing to do so excused petitioner performance of the condition of inspection.

Conclusive Evidence of Fraudulent Grading

A. The contrasting inspections

The issues under Count I may also be disposed of through consideration of facts which the Court ignored, demonstrating conclusively the lack of honest judgment by McCurley and Young.

On the initial tender of 47 lots they accepted 11 inferior lots not knowing them to belong to petitioner and then suddenly reversed themselves on learning of petitioner's ownership, and rejected 36 slightly superior lots. (*Supra* pp. 30-32).

This record of bad faith was followed by another such act, in McCurley's requirement that all lots be completely reworked before their inspection. His refusal to inspect and reinspect lots tendered by petitioner, without reworking was a breach of contract in itself, as well as an act of bad faith. (*Supra* pp. 35, 36)

Also incriminating is the inspectors' record after the lots had been reworked. (*Supra* pp. 37, 38)

McCurley and Young's grading record is in irreconcilable contrast with Shearer's gradings, and the record in other cities. (*Supra* pp. 32, 33, 37)

The Court disregared the contrasting inspection results by failing to recognize that the eggs involved were of comparable quality, with the slight differences in their quality accentuating rather than explaining the contrasts. But the undisputed evidence establishes this comparability of the lots. (*Supra* pp. 27, 28)

B. False testimony

Further compelling evidence of bad faith is found in McCurley's consistently false testimony.

It is an established rule of evidence, logic and common sense that when a person is charged with wrongdoing, falsifies and fabricates evidence, it is because he has something to conceal; and the falsity of his testimony *is positive evidence on the issue involved. Allen* v. *United States*, 164 U.S. 492 (1896); *Stanley* v. *United States*, 245 F. 2d 427 (C.A. 6, 1957). In *Barnes & Co.* v. *Kokosoi*, 102 F. 2d 450 (C.A. 2, 1939), Judge Learned Hand stated the principle in terms of law and logic. After finding that evidence had been fabricated, he held and said (p. 453):

> "That goes much further than merely to discredit the document itself; it is positive evidence upon the very issue, and weighty evidence as well. Wigmore Sec. 278. When a party is once found fabricating or suppressing documents the natural, indeed the inevitable conclusion is that he has something to conceal, and is conscious of guilt. We so conclude here."

Indeed, it has been said that the "fabrication of testimony is always a badge of weakness in a case, and when clearly established justifies a conclusion of fraud in the entire case." *Gung You* v. *Nagle*, 34 F. 2d 848, 850 (C.A. 9, 1929). Where *fraud* is charged on the part of the person *falsifying*, the rule applies with even greater force, since he demonstrates his dishonesty by his testimony.

McCurley testified that he had not refused to inspect or reinspect lots unless reworked. The Court convicted him of falsity by finding the opposite. (*Supra* p. 37)

It is true that the Court sought to excuse his refusal to inspect by the finding (with no support in the evidence), on the ground he did so because the inspections made at the time of storage indicated *some* of the lots might not pass inspection. But that unsupported finding in no way alters the falsity of his testimony that he did *not* refuse to inspect.

McCurley further denied that he made any advance statement that storage eggs would have difficulty meeting the contract standards. The Court convicted him of falsity by finding the opposite. (*Supra* p. 29)

Again, it is true that the Court found he qualified his statement about the difficulties facing storage eggs, by saying "unless they were reworked." The finding of that qualification (with no support in the evidence at all), even if true, did not alter the fact that McCurley testified falsely in saying *no* such statement was made.

McCurley and Young both falsified in testifying that the warehouse employees had selected the sample cases for the 11 lots accepted at the outset. The falsity was shown by their own certificates, and by a written report, shortly after the inspections, from Dolson to Washington, stating that "McCurley advised me that on each and every car[1] they did draw their own samples." (*Supra* pp. 31, 32)

McCurley falsely testified that he inspected lots reworked at Avon and Bushnell by grading sample cases in the cool warehouse, while the remainder of the lots were deteriorating in the hot sun on the unloading platform. The falsity of this testimony is shown by his own certificates, describing the *lots* as being in storage at the time he graded the samples. (*Supra* p. 38)

The foregoing facts by themselves conclusively demonstrate bad faith. *None* of them are mentioned by the Court in its opinion wherein it rules there is *no* evidence of bad faith.

The Department of Agriculture is by law charged with the duty of prohibiting discrimination in the marketing of agricultural commodities (See U. S. Warehouse Act, 70 USC Sec. 241, et. seq.; Perishable Agricultural Commodi-

[1] The term car and lot are used interchangeably to describe a load of eggs.

ties Act, 7 USC Sec. 499(a), et seq.; Packers and Stockyard Act, 7 USC Sec. 181, et seq.). For the Department of Agriculture to cause discrimination rather than prevent it, would amount to a perversion of the powers of Government.

The Court of Claims has recognized that discriminatory executive action lacks validity. *American President Lines, Ltd.* v. *U. S.*, 291 F. 2d 931 (1960).

It has been shown that Instruction No. 918 was not even a program of the USDA, having been cancelled by higher authority (*supra* pp. 55, 56). It had never become a published regulation and, therefore, even if a policy, and even if also non-discriminatory, it could not serve to justify the action it espoused.

The Administrative Procedure Act invalidates such unpublished policy. Its pertinent provisions are found in Section 3(a) providing:

> "Rules.—Every agency shall separately state and currently publish in the Federal Register . . . : (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . .; and (3) substantive rules adopted as authorized by law . . . No person shall in any manner be required to resort to organization or procedure not so published." (5 U.S.C.A. 1002)

"Rule" is defined by the Act (Sec. 2(c), 5 U.S.C. 1001(c)) in the following terms:

> ". . . 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to . . . or prescribe the law or policy or to describe the organization, procedure, or practice requirements of any agency. . ."

Failure to meet the above requirement invalidates an unpublished policy. *Hotch* v. *U. S.*, 212 F. 2d 280 (C 49, 1954).

The Legal Relevance of Facts Proved Under Counts II, III and IV

The persistent denial of petitioner's rights to grade service proved under these counts are closely allied to the pattern of conduct established under Counts I and V, with Dolson and McCurley being the culprits.

Being similar in character, and being part and parcel of the same course of conduct, those facts should have been found to prove Counts I and V. Closely in point on the facts, and approving principle of law is *United States* v. *Schiller*, 187 F. 2d 572 (C.A. 2, 1961). In that case, a criminal prosecution, one of the defendants had been a public housing official, charged with conspiracy to defraud the United States by accepting bribes. The factual issue was whether a certain "loan" was in fact a loan.

Evidence was received showing that the defender had been accepting "commissions" from prospective tenants, in violation of New York State law and rent control regulations. Relying on Professor Wigmore, the Court held and said (p. 574):

> "His testimony that he had received commissions from prospective tenants for services which were in violation of a New York penal law prohibiting excessive charges in connection with rental agreements tended to show that *he had an intention to use his office in disregard of the rental control regulations in situations like the case at bar.*" (Emphasis supplied)

Legal questions concerning this similar-fact evidence, have not involved relevancy, but competency in criminal cases: *United States* v. *Stirone*, 262 F. 2d 571 (C.A. 3, 1959).

The Denial of Relief Under Counts II, III and IV

Petitioner's Motion for Reconsideration explained to the Court that petitioner had not intended to and did not indicate in oral argument any weakness in Counts II, III, and IV and that there must have been a misunderstanding.

Assuming, arguendo, the propriety of dismissal of the counts had a concession been made orally as the Court believed, petitioner's Motion for Rehearing, it is submitted, should have been granted.

Rule 53 of the Court of Claims, relating to such motions provides in part:

> "(a) Grounds: (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted when any party questions the correctness or the sufficiency of the Court's conclusions on its findings of fact, or desires to amend the same, or on any ground established by rules of common law or equity applicable as between private parties."

Rule 54 of that Court relating to relief from judgments provides in part:

* * * * *

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake. . ."

All the circumstances indicate that there must have been a misunderstanding; and that petitioner's attorney did not concede any fault with Counts II, III, and IV. It is not even contended. It is clear that, in one respect at least, that the Court went beyond anything said in oral argument, from its failure to make findings of fact under Counts II, III and IV. That error by the Court suggests that possibly the Court also erred in its understanding of the oral argument.

Rule 60 of the Federal Rules of Civil Procedure, the source of Rule 54b of the Court of Claims, has been held to authorize the vacating of a consent judgment when the attorney consenting had no authority to do so. *In Re: Gsand*, 153 F. 2d 1001 (C.A. 3, 1946).

Also to be considered are the facts proved under Counts II, III and IV showing that the bad faith exhibited by McCurley in the gradings were only part of a course of conduct which had begun months earlier and continued months later. Those facts the Court expressly disregarded in its express failure to make findings under those counts; here the failure was even greater, although not so readily apparent.

There is no doubt that the Court's ruling of a failure of proof under Count II was completely unjustified and that the Commissioner was correct.

Count V

Petitioner's basic substantive right to seek justice without being punished has not been challenged. It could not be challenged without shocking a normal sense of justice.

Clearly in point is the Court of Claims decision in *Blair* v. *United States*, 99 Ct. Cl. 71, 1942. There the Court, dealing with punitive reprisals for filing claims under the disputes clause, held and said:

> "Above all, there was clearly implied in such provision an obligation . . . and undertaking by the defendant not to commit or permit any act intended as punishment of the contractor for so attempting to invoke the contract provision and to follow the procedure therein provided so as to obtain a fair and impartial decision . . ."

On review, this Court modified the judgment below, but did not in any way question the principle thus expressed. 321 U.S. 730, 1943. In fact, Mr. Justice Frankfurter, dissenting in part, stated (p. 739):

> "As a reciprocal duty of the Government, the contract brings into operation the implied warranty that those who have in effect keeping the administrative machinery for settling controversies will not prevent its utilization for all practical purposes."

The evidence compels the conclusion that this oppression was visited upon petitioner.

It has been shown that Dolson's threat was directed solely to the filing of a claim, and unrelated to other matters (*supra* pp. 44-47). There is also no doubt that his threat was carried out.

The Court's own findings show that in a short time petitioner was deprived of most of its shell egg grading service without replacement, and for many months had no such service at all, although essential to its business (*supra* pp. 49, 50).

If the mere filing of a claim could so antagonize Dolson, one would expect more violent action when he learned of pending disclosure of the statistical study showing widespread fraud in Chicago, where he had his office, by employees under his jurisdiction.

No one can assert who bears personal guilt for that fraud. It is clear, however, that Dolson and McCurley bore *executive* responsibility.

The drastic action which followed is, therefore, in view of prior events, a natural development.

The quick destruction of the Tri-State Marketing Plant by Schoonover is clearly established (*supra* pp. 51, 52).

Also clear is the correctness of the Commissioner's findings that the contract cancellation was forced on petitioner. The idea of Mr. Nichols planning to go out of business while earning $40,000 a year, in his lifetime business, is preposterous. His telegrams demanding service completely negatives the notion that his prior letter could be interpreted as if a request for cancellation, even from a literary standpoint. In any event, the telegrams superseded the letter.

Further to be considered is the deliberate avoidance by USDA of contact with petitioner's attorney, while the steps leading to the cancellation were rapidly occurring. (*Supra* p. 54)

The grounds of the Court's action in upholding the discriminatory proposal for grading service after cancellation raised grave implications.

That proposal was clearly further punishment, since it would leave petitioner in a worse position than before the cancellation.

The Denial of Due Process to Petitioner

Denial of equal protection of the laws is a denial of due process prohibited by the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

The requisites of a full hearing, also required by the Fifth Amendment, were described by this Court in its classic statement in *Morgan* v. *U. S.*, 298 U.S. 468 (1935) as follows (480, 481):

> "... Nothing can be treated as evidence which is not introduced as such ... . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order ...
>
> "... The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous consideration which in other fields might have play ... The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

CONCLUSION

Many of the Court's errors, standing alone, would justify the granting of the writ. Petitioner's grievances consist of the *totality* of those errors which, if petitioner's statement is true, should not occur in any civilized country.

The condemnation of petitioner makes petitioner's statement, incredible as it is, even more incredible. If it is incredible to the Court, it is even more incredible to petitioner.

Petitioner believed that the difficulties in making delivery at Peoria were the climax of its troubles. They proved anticlimax.

Petitioner believed that the oppression which it suffered for pursuing its rights were the climax. They were anticlimax to the decision of the Court and its opinion condemning petitioner for making unsupported charges against persons guilty of brutal oppression, and in effect, by virtue of the result reached, officially approving fraud, oppression, and perjury.

Petitioner respectfully submits its case to be worthy of a grant of certiorari, accepting full responsibility for the accuracy of this petition.

Respectfully submitted,

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